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loss as one of the hazards of doing business.[24] Whether or not the warranty of fitness arises will therefore depend, as in the sales transaction, on the totality of the commercial setting. This setting includes, but is not limited to, such factors as expertise of the lessor, reliance by the lessee, and the general character of the lessor's business.[25] In conclusion, the court states a rule which echoes the language of the UNIFORM COMMERCIAL CODE,[26]

> In the absence of an agreement to the contrary, where the lessor has reason to know any particular purpose for which the leased chattel is required and that the lessee is relying upon the lessor's skill or judgment to select or furnish a suitable chattel, there is an implied warranty that the chattel shall be fit for such purpose.[27]

In the opinion of this writer, the position taken by the Supreme Court of Florida in the case at bar is a realistic one which recognizes the demands of a commercial society in which greater numbers of people are leasing rather than purchasing. Since the sale-lease distinction is, at best, an artificial one, there is little justification for not applying the same theory of liability in both situations. It is clear that the movement towards extending warranty liability in chattel lease cases will necessitate greater protection for the lessee. It is clear that the principles of the UNIFORM COMMERCIAL CODE encourage and afford an ideal and convenient means for the development of this line of judicial reasoning.

KAREN BETH KAY

IMPEACHMENT OF A DEFENDANT IN A CRIMINAL CASE: THE DOOR IS OPEN

The defendant, Viven Harris, was charged with the sale of heroin. After arrest but without having been given the Miranda warnings, he made certain statements to the police. These statements, concerning what the defendant had sold—heroin or baking powder—were introduced into evidence at defendant's trial for impeachment purposes to contradict parts of his direct testimony. The jury was instructed to consider these statements *only* in the context of the defendant's credibility and not as an admission or evidence of guilt. Harris was found guilty. The Supreme Court of New York affirmed.[1] The New York Court of Appeals affirmed in a *per curiam* opinion holding that notice need not be given to a defendant before

24. *Id.* at 100.
25. *Id.*
26. UNIFORM COMMERCIAL CODE § 2-315. *See* note 5 *supra.*
27. 238 So.2d 98, 100 (Fla. 1970).

1. 31 A.D.2d 828, 298 N.Y.S.2d 245 (1969).

trial when defendant's statements are used solely for impeachment purposes, and are not offered into evidence.[2] On certiorari to the United States Supreme Court *held* affirmed: A statement made to the police by a defendant when the police had not warned the defendant of his right to appointed counsel, as required by *Miranda v. Arizona*,[3] could be used to impeach the defendant's direct testimony. *Harris v. New York*, 91 S. Ct. 643 (1971).

A basic rule of evidence states that an accused who takes the stand in his own behalf subjects himself to the same liabilities on cross-examination as do other witnesses. Therefore, he is subject to impeachment.[4] A primary method of impeachment is to prove that a witness has made prior statements inconsistent with his present testimony. Although there is a split of authority[5] on whether such statements are admissible, there has always been a line of cases in the United States which has followed this rule completely, permitting an accused who offers himself as a witness to be impeached by proof of a confession or statements even when such are not shown to have been legally obtained.[6]

In 1914, the exclusionary rule of *Weeks v. United States*[7] was announced. In the *Weeks* case, letters taken in violation of the fourth amendment search and seizure rule were not permitted to be used at the trial. The Court stated:

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[8]

The Supreme Court, in *Walder v. United States*,[9] began to limit the rule of the *Weeks* case. Justice Frankfurter, speaking for the *Walder* majority, said that the defendant

> must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief.[10]

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2. 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S.2d 71 (1969).
3. 384 U.S. 436 (1966).
4. C. McCORMICK, LAW OF EVIDENCE § 131 (1954).
5. *See* Note 22 *infra* and accompanying text.
6. Bailey v. United States, 328 F.2d 542 (D.C. Cir. 1964); Hicks v. State, 99 Ala. 169, 13 So. 375 (1893); Commonwealth v. Tolliver, 119 Mass. 312 (1876); State v. Fisher, 108 Mont. 68, 88 P.2d 53 (1939). Florida's position is contra. In State v. Galasso, 217 So.2d 326 (Fla. 1968), the Supreme Court of Florida specifically held that pre-trial statements tainted by reason of failure to give the defendant the *Miranda* warnings should be excluded for all purposes, including impeachment of defendant. *See also* Young v. State, 234 So.2d 341, (Fla. 1970).
7. 232 U.S. 383 (1914).
8. *Id.* at 393.
9. 347 U.S. 62 (1954).
10. *Id.* at 65.

However, there are certain cases to which this rule does not apply. *Walder,* a case of impeachment as to a collateral issue, was one example. The Court cited *Michelson v. United States*[11] as another instance. In *Michelson* the Court allowed the use of a reputation witness by the state to contradict the defendant's reputation witness.

The next case involving such special circumstances was *Tate v. United States.*[12] In *Tate,* the court held that a defendant could be impeached by improperly obtained evidence if the statement made related to "lawful proper acts"[13] collateral to the issues before the jury.[14]

Bailey v. United States[15] involved a claim of a violation of the requirements set forth in *Mallory v. United States*[16] and held that a defendant could be impeached on minor points by his prior statements.[17]

Harris v. New York moves a major step further and holds that a defendant who takes the stand "may" be impeached by inconsistent prior statements which, while they bear directly on the crimes charged, cannot be used as evidence in the prosecution's case-in-chief.[18]

Chief Justice Burger extended the holding in *Walder* to the present case, reasoning that there is no basic difference between impeachment as to collateral issues and impeachment as to matters bearing directly on the crime. The benefits to be gained by giving the jury an added insight into the credibility of the defendant outweigh the possibility of fostering the impermissible police conduct which the *Miranda* Court feared. Apparently, Justice Burger's chief concern is to avoid the possibility that the defendant may be committing perjury. This is evidenced by the fact that in his opinion, Justice Burger relies on cases which hold that prosecutions for perjury are not barred by the fact that the defendant's testimony, which is subsequently challenged as perjured, was given without the defendant having been advised of his constitutional rights according to

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11. 335 U.S. 469 (1948).

12. 283 F.2d 377 (D.C. Cir. 1960).

13. *Id.* at 380.

14. [S]tatements concerning lawful activity uttered during a period of "unnecessary delay" before preliminary hearing may . . . be received for impeachment of statements about the same matters made by the accused on his direct examination.

Id. at 381.

15. 328 F.2d 542 (D.C. Cir. 1964).

16. 354 U.S. 449 (1957). Briefly stated, the *Mallory* rule makes statements made by a criminal defendant during a period of unnecessary delay in bringing the defendant before a committing magistrate inadmissible. This rule was adopted as a method of enforcing rule five of the Federal Rules of Criminal Procedure which require arraignment before a magistrate without unnecessary delay.

17. The Court found, however, that there was no unnecessary delay so as to make the defendant's statement inadmissible under the *Mallory* rule.

18. The Court limited its holding to "trustworthy" statements made by the defendant. The Court said "[t]he petitioner made no claim that the statements made to the police were coerced or involuntary." 91 S. Ct. at 645. This statement suggests that the rule announced by the Court may be limited to only those instances where the defendant makes no claim that his pre-trial statements were coerced or involuntary.

Miranda[19] and that a defendant who purposely files false wagering registration forms is not protected by claiming the fifth amendment.[20] The same reasoning is applied in this case: the defendant cannot make false statements and then claim the privilege of self-incrimination to exclude prior inconsistent statements. The opinion contends that the prosecution merely used "the traditional truth-testing devices of the adversary process."[21]

There has always been a split of authority in both the federal and the state courts as to whether illegally obtained statements may be used to impeach an accused on cross-examination. The great majority of cases hold that this is an impermissible practice.[22] The rationale of the majority position is that illegally obtained confessions or statements initially are not trustworthy and additionally that the admission of these statements into evidence is a violation of the fifth amendment.[23] In the instant case, then, the Court follows a small minority in arriving at its conclusion.

Miranda v. Arizona, decided in 1966, held that

> [T]he fifth amendment privilege against self-incrimination applies to "custodial interrogation" and that statements obtained from a suspect during such interrogation are inadmissible unless the prosecution has employed procedural safeguards to "secure" the privilege.[24]

The Court feared the possibility of "third-degree" interrogation, and

> [A]lthough mentioning the danger of false confessions, the Court made it clear that it condemned such an "interrogation environment" primarily because of the injury to the dignity of the suspect. . . . [T]he Court is concerned not only with involuntary confessions but also with involuntary questioning . . . .[25]

The requirements of *Miranda* are but means of protecting the constitutional rights of the defendant.

According to Chief Justice Burger, *Miranda* is not controlling in the

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19. Dennis v. United States, 384 U.S. 855 (1966). On this point *Dennis* cites United States v. Winter, 348 F.2d 204 (2d Cir. 1965), *cert. denied,* 382 U.S. 955 (1965).

20. United States v. Knox, 396 U.S. 77 (1969).

21. Harris v. New York, 91 S. Ct. 643, 645 (1971).

22. Inge v. United States, 356 F.2d 345 (D.C. Cir. 1966); White v. United States, 349 F.2d 965 (D.C. Cir. 1965); Johnson v. United States, 344 F.2d 163 (D.C. Cir. 1964); Bayless v. United States, 150 F.2d 236 (8th Cir. 1945); People v. Pelkola, 19 Ill. 2d 156, 166 N.E.2d 54 (1960); People v. Hiller, 2 Ill. 2d 323, 118 N.E.2d 11 (1954); People v. Sweeney, 304 Ill. 502, 136 N.E. 687 (1922); Ladner v. State, 231 Miss. 445, 95 So.2d 468 (1957); State v. Turnbow, 67 N.M. 241, 354 P.2d 533 (1960); State v. Goodwin, 207 Or. 642, 298 P.2d 1024 (1956); Annot., 89 A.L.R.2d 478 (1963); Annot., 9 A.L.R. 1358 (1920).

23. "If no other evidence on the ground of contradicting the defendant as a witness could be found, he had better have gone uncontradicted than that his legal rights as a prisoner should be so violated. . . ." State v. Shepard, 88 Wis. 185, 187, 59 N.W. 449, 450 (1894). *See also* Ladner v. State, 231 Miss. 445, 450, 95 So.2d 468, 471 (1957): "The admission of an involuntary confession is a denial of the guarantees of the due process of law."

24. *The Supreme Court, 1965 Term,* 80 HARV. L. REV. 191, 201 (1966).

25. *Id.* at 204.

present case. It is true that *Miranda* barred the use of improperly obtained statements or confessions in the prosecution's case-in-chief. It is also true that "comments in the *Miranda* opinion can indeed be read as indicating a bar to the use of an uncounseled statement for any purpose."[26] Will the policy reasons behind *Miranda* be carried out when statements obtained during police interrogation—conducted without the correct procedures or safeguards—are used for impeachment purposes? Is it consistent with *Miranda* to allow the state to do indirectly what it is not allowed to do directly? Is it not true that

> [T]o permit the Government to introduce illegally obtained statements which bear directly on a defendant's guilt or innocence in the name of "impeachment" would seriously jeopardize the important substantive policies and functions underlying the established exclusionary rules?[27]

Can this question be dismissed merely because the jury has been instructed to consider the statements only for impeachment purposes? Or, is this a situation where "constitutional rights may suffer as much from subtle intrusions as from direct disregard?"[28]

The Court's decision seems to be based primarily on *Walder v. United States*. But as mentioned in the dissent, *Walder* is easily distinguished. In that case the defendant was impeached on a collateral issue.[29] *Michelson,* cited in *Walder,* concerns the right of the state to call a reputation witness to counteract the reputation witnesses called by the defendant. It is an established rule of evidence that when the defendant calls a reputation witness, he opens the door to that subject and the prosecution may pursue the point with contradictory witnesses.[30] *Tate* and *Bailey* are similar cases in that they deal primarily with minor or collateral matters. The rulings in these cases, especially in light of the majority of cases on point, should not automatically be extended to cover the situation in *Harris*.

The *Harris* opinion briefly mentions the problem of perjury stating that the privilege to testify in one's own defense "cannot be construed to include the right to commit perjury."[31] This is the essence of Chief Justice Burger's reasoning. Burger envisions the Court as being faced with competing policies: one which prohibits the use of illegally obtained evidence

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26. 91 S. Ct. at 645. For example, the *Miranda* Court stated:

> [T]here can be no doubt that the fifth amendment privilege . . . serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.

Miranda at 467.

27. Johnson v. United States, 344 F.2d 163, 166 (D.C. Cir. 1964).

28. Bayless v. United States, 150 F.2d 236, 238 (8th Cir. 1945). *But see* note 16 *supra.*

29. Note that it is nowhere mentioned that according to standard rules of evidence, there can be no impeachment on a collateral issue. C. McCORMICK, LAW OF EVIDENCE § 47 (1954).

30. *See, e.g.,* Ivey v. State, 132 Fla. 36, 52 So. 194 (1910).

31. 91 S. Ct. at 645.

and the other which demands the truth from a witness.[32] A "cautious balancing" is necessary. For Burger and the majority of this Court, the second objective is more important to the administration of justice. The Court reasons that if a prior statement of the defendant cannot be used against him for impeachment *or* as evidence, there is more of a tendency on the part of the defendant to perjure himself by contradicting his prior statement with his in-court testimony. On the other hand, the majority of the impeachment cases, the majority in *Miranda,* and the dissent in *Harris* would give the first objective—that of prohibiting the use of illegally obtained evidence—a definite priority.

The result in this case cannot be considered surprising in view of the change in the composition of the Court. Justices Harlan, Stewart and White were in the dissent in *Miranda.* Chief Justice Burger was the district court judge in *Johnson v. United States*[33] which permitted the use of an "improperly" obtained confession for impeachment purposes, and he also wrote the opinion in *Tate v. United States,* exemplifying the same view. With the instant decision the Court is in effect undercutting both *Miranda*'s attempt to supply adequate safeguards to keep the fifth amendment self-incrimination clause intact and to more effectively "police the police" and the *Weeks* exclusionary rule which *Walder* does not claim to have overruled.

The Court is in essence adopting the position of a minority of states by holding that impeachment by means of illegally obtained evidence is permissible. However, the Court makes no mention of these cases, relying instead on the cases which have eroded the exclusionary rule of *Weeks.* In this author's opinion, the Court by so doing, ignores a possibly more valid method—that of following an established line of cases—which it could have used to arrive at its desired result.

JAN NOVACK

THIRTY DOLLARS OR THIRTY DAYS: EQUAL PROTECTION FOR INDIGENTS

Two defendants, convicted of arson, were granted probation on the condition that each pay a fine of $2500 plus a penalty assessment of $625, or in lieu of payment, serve one day in the county jail for each $10 unpaid. This procedure was authorized by statute.[1] One defendant paid and was summarily released from custody. The other defendant, Antazo, was an indigent and therefore began serving his default sentence. While incarcerated, he petitioned the California Supreme Court for a writ of

32. Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960).
33. 344 F.2d 163 (D.C. Cir. 1964).

1. CAL. PENAL CODE § 1205 (Deering 1960).